FEDERAL RULE OF EVIDENCE 404(b)

(b) Crimes, Wrongs, or Other Actds.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a specific occasion the person acted in accordance with the character.

(2) Permitted Uses . . . . This evidednce may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

INTRODUCTION

The numbers tell the story.

The counterintuitive nature of the prohibition of using character as circumstantial proof of conduct

Everyday reasoning in the real world

The nature of the prohibition of using character as circumstantial proof of conduct

THE ITEM OF EVIDENCE

Testimony about another wrong by the person------→

THE INTERMEDIATE INFERENCE

The person's character ----------→

THE ULTIMATE INFERENCE

On the occasion alleged in the pleading, the person acted "in character."

The rationale for the prohibition is a concurrence of two probative dangers.

The first inference from the item of evidence to the intermediate inference poses the risk of misdecision.

The second inference from the person's character to conduct consistent with character poses the risk of overvaluation.

GENERAL OVERVIEW

Although Rule 404(b) jurisprudence may seem complex, in the final analysis it is straightforward and sensible. It boils down to this:

In a civil action or prosecution, testimony about another act or event involving is admissible

IF

there is sufficient, admissible testimony to support inferences that the act or event occurred and that the person performed the act or was involved in the event

AND

the testimony

(1) falls within an exception to the character evidence prohibition such as Federal Rules 413-15, **OR**
(2) is logically relevant on a theory other than the theory forbidden by Federal Rule 404(b)(1)

AND

under Rule 403, the opponent does not persuade the judge that the attendant probative dangers such as unfair prejudice substantially outweigh the probative value of the testimony.

We shall now turn to 16 different specific aspects of this general overview.

#1: THE DOCTRINE CODIFIED IN FEDERAL RULE 404(B) APPLIES IN CIVIL ACTIONS AS WELL AS CRIMINAL PROSECUTIONS

The Applicability of Rule 404(b) to Civil Actions

The text of Rule 404(b)

-----The reference to "wrong, or other act"

-----No express limitation to criminal cases except in the notice provision

The context, Rule 415

The Importance of the Conclusion That Rule 404(b) Applies to Civil Actions

During the liability phase, when the proponent offers testimony about other acts to prove the intent to discriminate on the basis of age, race, or sex, Rule 404(b) governs.

Although Rule 1101(d)(3) exempts criminal sentencing proceedings from Rule 404(b), there is no similar exemption for damages testimony. Thus, when the proponent offers testimony about the defendant's other acts to prove entitlement to exemplary or punitive damages, again Rule 404(b) governs.

Prior to the enactment of the Federal Rules, many courts took an exclusionary approach to the admissibility of evidence of other acts: There was a general rule excluding such evidence, and in order to introduce such testimony the plaintiff had to show that the testimony fit within a finite number of recognized exceptions to show the existence of a condition, its dangerousness nature, the defendant's notice, or causation. As we shall see in #9, infra, Rule 404(b) codifies an inclusionary approach.

#2; RULE 104(B) GOVERNS THE PRELIMINARY FACTS OF THE OCCCURRENCE OF THE ACT OR EVENT AND THE PERSON'S PERFORMANCE OF OR INVOLVEMENT IN THE ACT; THERE, IT IS SUFFICIENT IF THE PROPONENT PRESENTS ENOUGH EVIDENCE TO SUPPORT A PERMISSIVE INFERENCE THAT THE PERSON PERFORMED THE ACT OR WAS INVOLVED IN THE EVENT.

Before the enactment of the Federal Rules, most jurisdictions required that the trial judge find that the person performed the act or was involved in the event by a preponderance of the evidence. Many even required clear and convincing evidence. That is no longer the rule in federal practice.

The Preliminary Factfinding Procedures in Rules 104(a) and 104(b)

The Competence Procedure, 104(a)

-----The judge decides the issue as question of fact.

-----The judge considers the testimony on both sides—the right to voir dire in support of the objection.

-----The judge passes on the credibility of the testimony.

-----The judge makes the final decision

The Conditional Relevance Procedure, 104(b)

-----The judge passes on a question of law: Did the proponent present enough testimony to support a permissive inference? The judge does not pass on credibility.

-----If there is enough testimony, the judge admits the evidence, the opponent presents contrary testimony to the jury, and the jury makes the final decision.

The Rationale for the Distinction Between the Two Sets of Procedure

Rule 104(b) applies to 602 (personal knowledge) and 901 (authenticity). If the jury decides that "He doesn't know what he's talking about" or "the exhibit isn't worth the paper it's written on," common sense will naturally the jury to disregard the testimony during deliberations. It is safe to assign the decision to the jury.

Rule 104(a) applies to privilege issues under Rule 501 such as whether the attorney-client conversation occurred in a sufficiently private location. If at a conscious level the lay juror decides that the testimony is technically inadmissible, will he or she be willing and able to perform the mental gymnastic of ignoring the testimony?

The Application of Rule 104 to the Preliminary Facts That the Act or Event Occurred and That the Person Performed the Act or Was Involved in the Event

Huddleston v. United States, 485 U.S. 671 (1988)

#3: SINCE RULE 104(B) GOVERNS THE PRELIMINARY FACT OF THE PERSON'S PERFORMANCE OR THE ACT OR INVOLVEMENT IN THE EVENT, THE PROPONENT'S FOUNDATIONAL TESTIMONY MUST SATISFY ALL THE TECHNICAL EXCLUSIONARY RULES OF EVIDENCE SUCH AS HEARSAY; THE PROPONENT CANNOT RELY ON THE DISPENSATION IN THE LAST SENTENCE OF RULE 104(A).

The last sentence of Rule 104(a) reads: "In so deciding, the court is not bound by evidence rules, except those on privilege."

> As the Advisory Committee Note explains, the conventinal wisdom is that the common-law courts evolved the exclusionary rules such as hearsay in order to compensate for the supposedly limited competence of lay jurors to evaluate certain types of testimony. However, under Rule 104(a), the judge is the decisionmaker. There is no need to apply the "jury-protecting" rules.

There is no similar dispensation in Rule 104(b). Under 104(b), the jury makes the final decision; and it is therefore sensible to apply the "jury-protecting" exclusionary rules.

Thus, all the technical rules such as hearsay apply to the proponent's foundational testimony. A conviction in another criminal case constitutes hearsay in the instant case. Hence, if the proponent offers a prior conviction to prove the 404(b) act, the conviction must qualify under the hearsay exception codified in Rule 803(22).

#4. RULE 404(B) APPLIES ONLY IF THE TESTIMONY DESCRIBES A CRIME, WRONG, OR ACT "OTHER" THAN OR EXTRINSIC TO THE CONDUCT MENTIONED IN THE PLEADINGS; RULE 404(B) IS INAPPLICABLE WHEN THE TESTIMONY DESCRIBES AN ACT OR EVENT THAT IS INTRINSIC TO THE CONDUCT MENTIONED IN THE PLEADINGS.

Examples of Intrinsic Conduct

A charged felony murder – the underlying felony

A charged conspiracy – other overt acts

In civil cases involving a pattern or practice allegation – other acts manifesting the same pattern or practice

The Significance of Characterizing the Conduct as Intrinsic

The substantive significance: Rule 404(b) is inapplicable, and the proponent need not articulate a non-character theory of logical relevance.

The procedural significance: Rule 404(b)'s pretrial notice requirement is inapplicable.

Distinguishable Doctrines

The crimes are "inextricably intertwined."

The crimes are part of the same "res gestae."

See #13, infra.

#5. TO SATISFY RULE 404(B), THE ACT NEED NOT BE A PRIOR ACT; THE ACT NEED NOT ANTEDATE THE CONDUCT DESCRIBED IN THE PLEADINGS UNLESS THE PROPONENT'S SPECIFIC THEORY OF LOGICAL RELEVANCE NECESSITATES PROOF OF SUCH TIMING.

Although litigants sometimes use the label "priors" to describe Rule 404(b) evidence, there is no general requirement that the act antedate the act alleged in the pleadings.

> Suppose that a public official is charged with accepting a bribe. The official raises a subjective entrapment defense. To rebut the defense, the prosecution may introduce evidence that after the charged bribe, the defendant voluntarily accepted another bribe. A bribe accepted shortly after the charged incident is more probative on the entrapment issue than a bribe accepted long before the charged incident. The key questions are: (1) the length of the lapse of time; and (2) the existence of intervening circumstances that might change the defendant's disposition.

However, sometimes the proponent's specific theory of logical relevance imposes a timing requirement.

> Suppose that the defendant is charged with knowing receipt of stolen goods. The uncharged act was another receipt of stolen property from the same transferor. The prosecution argues that (1) the uncharged act occurred under such suspicious circumstances that the defendant had to know that the transferor dealt in stolen merchandise; and (2) the defendant continued to have that knowledge at the time of the later charged incident. If that is the thrust of the prosecution argument, the uncharged act must precede the charged act.
>
> The same would be true in a civil negligent entrusment action. The civil defendant must learn of the driver's propensity to drive carefully before the defendant entrusts the driver with the truck.

#6. TO SATISFY RULE 404(B), THE ACT NEED NOT BE SIMILAR TO THE CONDUCT DESCRIBED IN THE PLEADINGS UNLESS THE PROPONENT'S SPECIFIC THEORY OF LOGICAL RELEVANCE REQUIRES PROOF OF SIMILARITY.

Although litigants sometimes use the label "similars" to describe Rule 404(b) evidence, there is no general rule that the uncharged act must be similar to the conduct alleged in the pleadings.

Examples

-----drug use as a motive for theft

-----consciousness of guilt acts (e.g., attempted bribery of a witness) in a murder prosecution

However, sometimes the proponent's specific theory of logical relevance requires a showing of similarity.

The classic example is the use of modus operandi testimony to establish the defendant's identity as the perpetrator of the charged crime. When the prosecution relies on this theory, the prosecution must make an especially strong showing of similiarity. More specifically, the prosecution must show that the charged and uncharged acts share a distinctive, one-of-a-kind modus operandi that only one criminal is likely to use.

#7. TO SATISFY RULE 404(B), THE ACT NEED NOT BE EITHER CRIMINAL OR TORTIOUS.

Although litigants often use the labels "other crimes" or "extraneous offenses" to describe Rule 404(b) evidence, there is no general requirement that the proponent show that the uncharged act is a crime or even illegal in the sense of tortious in order to establish its relevance.

> Rule 404(b) refers to "crime, wrong, or . . . act" in the alternative.
>
> The misinterpretation of *United States v. Cook,* 557 F.2d 1149 (5th Cir. 1977)("To qualify for admission under Rule 404(b), . . . the injunction documents here would have to evidence the commission of some crime, wrong, or an act at least related in nature to the present charged of mail fraud. The consent to entry of injunctions of the type herein does not constitute a crime, wrong, or an act within the context of Rule 404(b)").
>
> Consider the example of a person charged with murdering his spouse. The prosecution argues that the defendant's motive was that he was having an affair. In almost all jurisdictions, having an affair is no longer a crime or, in a no-fault divorce jurisdiction, even a civil wrong. Nevertheless, the existence of the motive is highly probative on a noncharacter theory. The fact that infidelity is not illegal does not destroy its probative value.

We admit criminal or tortious misconduct because of its probative value – despite its illegal character that creates a potential for prejudice.

> If the act is neither criminal nor tortious, there is less potential for prejudice. There is all the more reason to admit the testimony and less justification for excluding it under Federal Rule 403.

#8. TESTIMONY ABOUT AN ACT IS LOGICALLY RELEVANT IF IT FALLS WITHIN AN EXCEPTION TO THE CHARACTER EVIDENCE PROHIBITION SUCH AS THE ONES SET OUT IN RULES 413-15.

The rape sword legislation, Rules 413-15, took effect as Congressional statutes in 1995.

In some respects, the rules are narrow.

The exceptions apply in only certain types of cases. Rule 413(d) defines "sexual assault" prosecutions, Rule 414(d) defines "child molestation" prosecutions, and Rule 415 relies on the same definitions.

Moreover, the rules admit only evidence that also establishes a "sexual assault" as statutorily defined or "child molestation" as statutorily defined.

In other respects, the rules are broad.

To begin with, they apply in some civil actions (Rule 415) as well as some prosecutions (Rules 413-14).

Moreover, they allow the proponent to rely on theories of logical relevance based on character or propensity reasoning. (However, there is an important caveat. There is no empirical support for the proposition that a single incident of conduct is sufficient to establish the existence of a propensity or character trait. Imwinkelried, Rehaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research, 38 Southwestern University Law Review 741 (2008). It is true that there are published opinions admitting testimony about a single instance of uncharged misconduct on a propensity theory under Rules 413-15, but the opponent has a strong argument that the rules should not be construed as going that far.)

#9. IF THE ACT DOES NOT FALL WITHIN AN EXCEPTION TO THE CHARACTER EVIDENCE PROHIBITION, THE TESTIMONY IS ADMISSIBLE ONLY IF IT SATISFIES RULE 404(B); THAT IS, IT IS INADMISSIBLE IF THE PROPONENT'S ONLY TENABLE THEORY OF LOGICAL RELEVANCE IS THE THEORY FORBIDDEN BY RULE 404(B)(1). HOWEVER, RULE 404(B) SHOULD NOT BE CONCEIVED AS A GENERAL RULE EXCLUDING TESTIMONY ABOUT OTHER ACTS, SUBJECT ONLY TO A FINITE NUMBER OF PREVIOUSLY RECOGNIZED EXCEPTIONS.

The Exclusionary Conception of the Doctrine

Before the enactment of the Federal Rules, many jurisdictions conceived of the doctrine as an exclusionary rule: There is a general rule excluding testimony about other acts, and to justify introducing such testimony the proponent must fit his or her evidence within the pigeonhole of one of a finite number of previously recognized exceptions. Bar review courses often used the MIMIC mnemonic – mistake or accident, identity, motive, intent, and common scheme or plan. If the proponent could not do so, the testimony was automatically inadmissible.

The Inclusionary Conception Codified in Federal Rule 404(b)

Rule 404(b)(2) lists many of the previously recognized noncharacter theories of admissibility. However, the list is prefaced by "such as." Those words signal that the list is illustrative, not exhaustive. In this respect, Rule 404(b) is similar to Rules 407 and 408. The question is not whether the proponent's testimony qualifies under one of the listed theories. Rather, the dispositive question is whether testimony about the act is relevant on *any* noncharacter theory. There is express authority in every circuit holding that Rule 404(b) overturns the exclusionary conception and incorporates the inclusionary conception.

The Challenge Under the Inclusionary Conception

It is not enough to monger buzzwords such as motive, intent, or plan—some of the ultimate facts expressly mentioned in Rule 404(b)(2). Rather, the proponent must be prepared to lay out **a complete chain of reasoning** from the item of evidence (the testimony about the uncharged act) that (1) is relevant under Rule 401 and (2) connects to an ultimate fact of consequence without positing an intermediate inference about the person's personal, subjective bad character. The proponent must be prepared to explain both: **WHAT** he or she hopes to prove and **HOW** the item of evidence will prove that without an assumption about the person's personal, subjective bad character. The 2020 amendment to the notice proivision in Rule 404(b) makes it even more imperative that the proponent be prepared to do so.

#10. RULE 404(B) EVIDENCE MAY BE USED TO PROVE THE OCCURRENCE OF THE ACTUS REUS OF THE CHARGED CRIME.

Rule 404(b) generally forbids using a person's character as circumstantial proof of their consistent conduct on a specific occasion alleged in the pleadings. Some leaped to the conclusion that the prohibition always forbids using uncharged misconduct to prove conduct in the most fundamental sense, that is, the occurrence of the actus reus. However, as #9 points out, the issue is whether the proponent can establish that a non-character theory of logical relevance is tenable on the facts.

The Leading Cases

Rex v. Smith, 11 Cr.App.Rep. 229 (1914) – the celebrated "Brides in the Bath" case

United States v. Woods, 484 F.2d 127 (4th Cir. 1973)

The Doctrine of Objective Chances

THE ITEM OF EVIDENCE

Testimony about an Uncharged Act----→

THE INTERMEDIATE INFERENCE

An Extraordinary Coincidence (considering

the Charged and Uncharged Events)----------→

THE FINAL INFERENCE
One or some of the events were not accidents.

Is the doctrine of objective chances a legitimate noncharacter theory?

The first step in the doctrine does not require the jurors to focus on the person's subjectve, personal character. Rather, the question is the occurrence of a coincidence that is objectively improbable or implausible. The second step does not require the jurors to use the person's character as a predictor of his or her conduct on a specific occasion. Rather, the step asks the jurors to do what the pattern jury instructions in most jurisdictions do, that is, invite the jurors to use their common sense and their real life experience to assess the relative plausibility of the litigants' claims.

When is it appropriate for the proponent to invoke the doctrine of chances?

The proponent must establish an extraordinary coincidence: Considering both the charged and uncharged incidents, the person has been involved in this type of event more frequently than we would expect the average, innocent person to do so. In some cases such as the Brides in the Bath, it is clear that the social loss is a "once in a lifetime" event. In other cases the proponent may have to marshal empirical data such as epidemiological studies to establish the baseline frequency.

What are the limitations of and caveats about relying on the doctrine of chances?

Jury instructions. Very few jurisdictions have pattern instructions on the doctrine. In *Estelle v. McGuire,* 502 U.S. 62 (1991), Justices O'Connor and Stevens expressed their view that the instruction on the doctrine was so vague that the petitioner had been denied due process and was entitled to habeas corpus relief. Give the judge proposed wording on a silver platter that makes it clear that the jury is to focus on the objective improbability of so many accidents, not the defendant's personal, subjective bad charactr.

Closing argument. Follow through in closing argument. If you rely on the doctrine as your theory of admissibility, during summation talk about "objective" improbility or implausibility. Do not refer to the "kind" or "type" of person the defendant is.

Admissibility verus legal sufficiency. Present independent evidence of the actus reus. The only inference from the doctrine is that one or some of the incidents may not have been accidents; the internal logic of the doctrine does not single out the charged incident as an actus reus. In *Woods,* a distinguished forensic pathologist opined that there was a 75% probability that the charged death was a homicide.

#11. THE DOCTRINE OF OBJECTIVE CHANCES CAN BE USED TO PROVE INTENT AS WELL AS ACTUS REUS. TO INVOKE THE DOCTRINE, THE PROPONENT MUST NOT ONLY SHOW THAT THE ACT IS SIMILAR TO THE TYPE OF EVIDENCE ALLEGED IN THE PLEADINGS. IN ADDITION, THE PROPONENT MUST DEMONSTRATE AN EXTRAORDINARY COINCIDENCE; CONSIDERING BOTH THE RULE 404(B) ACT(S) AND THE ACT ALLEGED IN THE PLEADINGS, THE PERSON MUST HAVE BEEN INVOLVED IN SUCH EVENTS MORE FREQUENTLY THAN THE AVERAGE, INNOCENT PERSON WOULD BE – THE BASELINE FREQUENCY.

Fact Situations in Which the Doctrine May be Used to Prove Intent

Wigmore's famous example of the hunting "accident"—2 WIGMORE, EVIDENCE § 302 (3d ed.)

Drug cases in which the defendant claims that he or she did not know that contraband drugs were secreted in the car the defendant was driving

Hypothesis testing evidence in civil cases alleging discrimination on the basis of age, race, or sex. The expert contrasts the expected and observed values.

The Same Caveats as in #10

Jury instructions

Closing argument

Admissibility versus legal sufficiency

#12. SOME PLAN THEORIES OF ADMISSIBILITY POSSESS GENUINE NON-CHARACTER RELEVANCE AND SATISFY RULE 404(B): SEQUENTIAL PLANS, CHAIN PLANS, AND TEMPLATE PLANS. HOWEVER, "SPURIOUS" OR UNLINKED PLANS—A SHOWING OF NOTHING MORE THAN RECENT, SIMILAR ACTS—AMOUNT TO INADMISSIBLE CHARACTER EVIDENCE.

Sequential plans

Steal the key to the bank entrance from the bank president. Then use the key during a burglary of the bank. The first crime provides the defendant with an instrumentality to commit the second crime. The second crime provides the motive for committing the first crime.

Chain plans

Defendant D needs to kill the other heirs, A, B, and C, to gain title to Greenacre. D has an overall, overarching objective: eliminating the other heirs to win Greenacre; D is not merely a killer. However, D need not kill the other potential heirs in any particular sequence.

Template plans

The crimes are not simply instances of an impulsive defendant spontaneously succumbing to the temptation to commit a crime of opportunity; there is evidence of forethought and advance planning. In the infamous Juan Corona prosecution years ago, the defendant's diary set out his advance planning.

Spurious or unlinked plans

The proponent's only evidence is testimony that the person recently committed similar acts. Although the cases are split on this issue, the better view is that without more this testimony amounts to nothing more than inadmissible character evidence.

#13. TESTIMONY ABOUT AN ACT DOES NOT SATISFY RULE 404(B) MERELY BECAUSE IT OCCURRED AT THE SAME TIME AS THE ACT ALLEGED IN THE PLEADINGS OR WAS PART OF THE SAME SERIES OF EVENTS. HOWEVER, EVEN IF THE TESTIMONY LACKS NON-CHARACTER RELEVANCE, THE JUDGE MAY ADMIT THE TESTIMONY IF IT IS PRACTICALLY INSEPARABLE FROM THE TESTIMONY ABOUT THE ACT ALLEGED IN THE PLEADINGS. BUT IF THAT IS THE ONLY REASON FOR ADMITTING THE TESTIMONY, THE JUDGE SHOULD TELL THE JURY THAT AND INSTRUCT THE JURY TO OTHERWISE DISREGARD THE TESTIMONY.

Think back to intrinsic acts, discussed in #4, supra. Distinguish two doctrines that are sometimes confused with intrinsic acts.

Res Gestae

The act occurred at the same time or as part of the same series of events as the charged crime. As in the case of spurious plans, there is a division of authority. However, the better view is that without more timing does not satisfy Rule 404(b); contemporaneous or not, an act must possess genuine non-character relevance to qualify for admission under Rule 404(b)(2). Rule 404(b)(2) demands such relevance, and there is no timing exception.

Inextricably Intertwined

Althought the act is distinct from the charged crime, for some reason the testimony about the two acts is practically inseparable.

--"I did *it* just the way I did it last month in Chicago."

--the prosecution of the member of a drug trafficking ring in prison

However, the courts rarely follow through on the logic of this doctrine. As Wigmore pointed out, if this is the only reason for admitting the testimony about the uncharged act, the jury should be bluntly told that and instructed to otherwise disregard the testimony about the uncharged act.

#14. IF THE TESTIMONY ABOUT THE ACT SATISFIES RULE 404(B), ON REQUEST THE JUDGE SHOULD GIVE THE JURY A LIMITING INSTRUCTION UNDER RULE 105. THAT INSTRUCTION SHOULD NOT ONLY FORBID THE JURY FROM TREATING THE TESTIMONY AS EVIDENCE OF THE PERSON'S BAD CHARACTER. THE INSTRUCTION SHOULD ALSO SPECIFICALLY IDENTIFY THE THEORY OR THEORIES ON WHICH THE TESTIMONY POSSESSES GENUINE NON-CHARACTER RELEVANCE; THE JUDGE SHOULD NOT GIVE A "SHOTGUN" INSTRUCTION.

A complete, Rule 105 instruction has two prongs.

The Negative Prong

This prong should expressly forbid the jury from engaging in character reasoning.

The Affirmative Prong

The judge should not give a "shotgun" instruction mentioning all the permissible uses listed in Rule 404(b)(2). Some of them are likely relevant only if the jury resorts to character reasoning. Rather, the judge should single out the legitimate non-character theory or theories tenable on the facts.

Ideally, the judge should do more than allow the jury to use the testimony as evidence of intent. Better still, the judge should lay out the complete permissible chain of reasoning from the item of evidence to the final inference. The best Rule 404(b) limiting instructions tell the jury not only **WHAT** they may ultimately infer from the evidence but, even more importantly, **HOW** they may reason to that inference without assuming the defendant's personal, subjective bad character.

Other Practical Comments about the Limiting Instruction

Urge the judge to refer to the other acts as "acts" or "transactions" rather than "crimes" or "offenses."

Again, provide suggested language to the judge on a silver platter.

#15. IF THE TESTIMONY PASSES MUSTER UNDER RULES 104(B), 404(B), AND 413-15, THE JUDGE MAY EXCLUDE THE TESTIMONY UNDER RULE 403 ONLY IF THE OPPONENT PERSUADES THE JUDGE THAT THE ATTENDANT PROBATIVE DANGERS SUCH AS UNFAIR PREJUDICE SUBSTANTIALLY OUTWEIGH THE PROBATIVE VALUE OF THE TESTIMONY.

At common law in many jurisdictions, the proponent of uncharged misconduct evidence had the burden of convincing the trial judge that the probative value of the evidence outweighed the incidental probative dangers. Some courts stated that the proponent had a "heavy" burden.

The Federal Rules of Evidence change the law.

The Text of Rule 403

-----the passive voice

-----the adverb "substantially"

The Context, Other Rules

The differently worded balancing tests in Rules 412 and 609

The Legislative History

------the contemporaneous legislative history

"In the early hearings on the then proposed Federal Rules of Evidence before the House of Representatives, Albert E. Jenner, Jr., the chairperson of the United States Judicial Conference Advisory Committee on Federal Rules of Evidence, asserted that 'the overall philosophy and thrust of the rules is to place the burden upon he who seeks the exclusion of relevant evidence." 30 Villanova Law Review 1465, 1474-79 (1985).

-----the later legislative history

the ninth paragraph of the Advisory Committee Note to the 1990 amendment to Rule 609 following the Supreme Court's decision in *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504 (1989)(under the normal Rule 403 standard, "Only when the government is able to point to a real danger of prejudice that is sufficient to outweigh substantially the probative value of the conviction for impeachment purposes will the conviction be excluded")

#16. UNDER RULE 403, THE JUDGE MAY HAVE OPTIONS OTHER THAN ALTOGETHER EXCLUDING THE TESTIMONY OR ADMITTING ALL THE TESTIMONY. FOR EXAMPLE, USING RULE 403 AS A SCALPEL, THE JUDGE MIGHT ADMIT TESTIMONY THAT A POLICE OFFICER SAW THE PERSON ON A PREVIOUS OCCASION TO INCREASE THE RELIABILITY OF THE OFFICER'S IDENTIFICATION OF THE PERSON BUT BAR THE DETAIL THAT ON THAT OCCASION THE OFFICER ARRESTED THE PERSON FOR A CRIME.

Ruled 403 is not an "all or nothing" proposition; the judge may use 403 as a scalpel rather than a meataxe.

By way of example, the judge might:

--exclude a prejudicial detail that has minimal or no logical relevance such as the name of the felony in *Old Chief v. United States,* 519 U.S. 172 (1997);

--restrict the number of witnesses to the uncharged incident; or

--limit the number of uncharged incidents.

Trial judges are often receptive to requests that they restrict uncharged misconduct evidence in this fashion.

To begin with, they have the satisfaction of exercising Solomonian wisdom.

Moreover, they realize that if the record reflects that they exercised discriminating judgment, the appellate court is very likely to uphold their ruling.

THE SEQUENCE OF ANALYSIS FOR 404(B) PROBLEMS

Rule 104(b)

Is there sufficient, admissible evidence to support inferences that the act or event occurred and that the person performed the act or was involved in the event?

Rule 401

What are *all* the theories on which the testimony is logically relevant? (One will almost always be a forbidden character theory.)

Rules 413-15

Does at least one of the theories fall within the scope of Rules 413-15?

Rule 404(b)

Does at least one of the theories possess genuine non-character relevance under Rule 404(b)?

Rule 403

Do the incidental probative dangers such as unfair prejudice substantially outweigh the probative value of the evidence?

Rule 105

How should the judge word the limiting instruction, describing both the improper and proper uses of the testimony?